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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS, CROSS-PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL., CROSS-RESPONDENTS

ON CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM OF CROSS-RESPONDENT INTERSTATE COMMERCE COMMISSION TO CROSS-PETITIONS

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UNITED TRANSPORTATION UNION AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS, CROSS-PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL., CROSS-RESPONDENTS

REPLY MEMORANDUM TO SEPARATE CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Cross-Respondent Interstate Commerce Commission (the Commission) respectfully submits that the cross-petitions filed by the United Transportation Union (UTU) and Brotherhood of Locomotive Engineers (BLE) in Nos. 85-983 and 85-997, respectively, further support a grant of the Petition for a Writ of Certiorari filed by the Commission in Docket No. 85-972. However, the Commission urges the Court to grant its petition and that of petitioner Missouri-Kansas-Texas Railroad Company (MKT) in Docket No. 85-793 rather than those of cross-petitioners.

All of the petitions present, directly or indirectly, the issue of the effect of 49 U.S.C. 11341(a) to remove all impediments to the implementation of transactions approved by the Commission under 49 U.S.C. 11343. More specifically, all of the petitions address the principal issue of the effect of Commission approval of a transaction subject to imposition of labor protective conditions upon the rights the parties would otherwise have in connection

with resolving disputes arising out of changes in working conditions associated with implementing the approved transaction.[1] The cross-petitions, however, raise additional issues never resolved by, or in some instances not presented to, the court below and the Commission, which are unnecessary to resolution of the principal issue raised by all parties to these proceedings.

STATEMENT

As to the facts of the case, there are no significant differences among the facts the various parties have presented to the Court in their respective cross-petitions and petitions. Briefly, the essential facts are as follows.

1. In October 1982, the Commission approved the proposed consolidation of the Union Pacific (UP), Missouri Pacific (MP), and Western Pacific (WP) Railroads. The Commission also granted the applications of the Missouri-Kansas-Texas (MKT) and the Denver and Rio Grande Western (DRGW)—for protective trackage rights to operate their trains with their own crews over MP tracks. To protect employees adversely affected by the approved trackage rights, the Commission imposed the standard labor protective conditions.

After DRGW and MKT initiated their respective trackage rights operations, UTC threatened a strike against MP and BLE and UTU initiated a Commission proceeding wherein they questioned the Commission's power to

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[1] This is a quite different issue from the one labor keeps positing of whether ICC approval authorizes rail management to make unilateral changes in working conditions and/or existing collective bargaining agreements. There is no dispute that, under the imposed labor protective conditions, the Missouri Pacific Railroad (MP) must negotiate with its employees and submit to binding arbitration, if necessary, protections to be afforded MP employees displaced as a result of MKT's and the Denver and Rio Grande Western Railroad's (DRGW's) commencement of trackage rights operations. What is at issue is whether MP rail labor organizations have the right to negotiate directly with MKT and DRGW or force MP to negotiate on their behalf over the crewing by MKT and DRGW of their authorized trackage rights operations.

authorize trackage right tenants to use their own crews over the lines of a competitor, thereby removing the crewing issue from the procedures of the Railway Labor Act (RLA).

2. In *Missouri Pacific R.R.* v. *United Transportation Union,* 580 F. Supp. 1490 (E.D. Mo. 1984) (*Missouri*) (affirmed 8th Cir. No. 84-1465) (decided January 15, 1986), a United States District Court for the Eastern District of Missouri-Eastern Division enjoined the UTU's threatened strike.[2] The District Court found that MP was exempted under section 11341(a), 49 U.S.C. 11341(a), from any requirements of the RLA to negotiate on behalf of its employees the crew selection clause in the approved trackage rights agreements. The court found further that the Norris-La Guardia Act restraints on a court's ability to enjoin labor strikes must give way to protect the integrity of the jurisdiction and orders of the Interstate Commerce Commission (*Id.* at 1503) and that the Commission may impose conditions that conflict with existing collective bargaining agreements and RLA procedures, noting that to hold otherwise would permit affected employees to block rail consolidations found to be in the public interest. The District Court relied upon *Brotherhood of Loc. Eng.* v. *Chicago and Northwestern Ry. Co.,* 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied,* 375 U.S. 819 (1963) (*C&NW*) for its conclusions.

3. As to the unions' challenge before the Commission, the Commission found that once the agency approved the trackage rights transaction subject to labor conditions, Section 11341 exempted the transaction from all impediments, including the RLA and existing collective bargain-

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[2] This proceeding was the subject of a petition for certiorari before judgment in No. 85-1054 which has been reformulated by supplemental pleading in light of entry of a decision on appeal by the court of appeals. The Commission received the pleading on January 31, 1986. The Commission sought and obtained an extension until 30 days from the date on which petitioners' supplemental brief is received to respond to the petition in that proceeding. This makes the Commission's response to that petition due on March 3, 1986.

ing agreements, as necessary to permit implementation of the transaction. The Commission also relied upon *C&NW* in support of the position that no findings by it were required to effectuate the exemption provided by Section 11341. The agency also observed that nothing in the record suggested, and no party had argued, that approval of the trackage rights applications subject to the labor protective conditions mandated by 49 U.S.C. 11347 would be inconsistent with the RLA.

Review of those decisions of the Commission was sought before the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Locomotive Engineers* v. *Interstate Commerce Commission,* 761 F.2d 714, petitions for certiorari pending (*BLE* decision). A majority of the panel of the court in *BLE supra,* over a dissent by Judge MacKinnon, found that the RLA may not be waived without an adequate Commission finding of necessity for doing so, and that the Commission failed to make such an adequate finding. Judge MacKinnon in his dissent emphasized that the majority had failed to come to grips with the holdings of the Eighth Circuit in *C&NW,* this Court in *Schwabacher* v. *United States,* 334 U.S. 182 (1948) and the District Court in *Missouri.* In addition, although disagreeing with the majority's findings requirement for displacing RLA procedures, he found that the agency had, in fact, met such a requirement.

ARGUMENT

It is clear that all parties agree that the issues presented by the Commission's petitions and the unions cross-petitions are extremely important to the entire rail industry (both management and labor) and to the orderly administration of both the Interstate Commerce Act and the RLA. (See I.C.C. Pet. in No. 85-792 p. 17, Brief of Association of American Railroads and National Railway Labor Conference As Amici Curiae in support of Pet. in No. 85-792 at p. 17, UTU Cross-Pet. p. 16 and BLE Cross-Pet. p. 22-23). The labor unions, the Commission, and the railroads all seem to believe that the lower court decision

was wrongly decided (See ICC Pet. in No. 85-792 p. 10-17, BLE Cross Pet. in No. 85-997 p. 11, 19-23, UTU Cross Pet. in No. 85-983 p. 12 and 15).

Although the Cross-Respondent Commission agrees with the cross-petitioners that the issues presented by the lower court decision should be reviewed by this court, cross-respondent believes its petition in No. 85-792 and that of MKT in No. 85-793 set forth the proper framework for resolution of the issues in dispute, while the cross-petitions do not. This is so because, in the Commission's opinion, the cross petitioners set forth issues which unnecessarily complicate the analysis and resolution of the principal issue involved—the effect of the Commission's approval of a transaction, subject to Commission imposed labor protective provisions which require compulsory arbitration, upon the rights of rail labor and management under pre-existing collective bargaining agreements and other agreements and laws governing railroad labor relations.

1) It cannot be gainsaid that implicit, if not explicit, in the holding of the court below and the question the Commission presents to this Court in No. 85-792 is: whether the Commission has authority under any circumstances to approve transactions which require changes in working conditions. However, the Commission believes its authority to approve such transactions is so well settled by a consistent line of recent courts of appeals decisions, as not to warrant plenary consideration by this Court. See e.g. *C&NW, supra,* 314 F.2d 424 (wherein the court of appeals, after extensive, and in the opinion of the Commission, correct analysis of the relevant decisions of this Court and the legislative history of the predecessor provision of Section 11341(a), concluded that the Commission was authorized to do so); *Nemitz* v. *Norfolk and Western Railway Company,* 436 F.2d 841 at 845 (6th Cir. 1971), affirmed in *Norfolk & Western R. Co.* v. *Nemitz,* 404 U.S. 37 (1971) (same); *New York Dock Ry* v. *U.S.,* 609 F.2d 83 (2nd Cir. 1979), (wherein the court of appeals recognized

that rail mergers call for major changes in working conditions and went on to approve the Commission's imposition of the *New York Dock* labor conditions, as satisfying the requirements of 49 U.S.C. 11347, including a principal *New York Dock* condition that requires compulsory arbitration of disputes arising out of changes in working conditions associated with implementing Commission approved consolidations); *Railway Labor Executives' Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982) (*RLEA*) (wherein the court of appeals approved: the Commission's imposition of labor protective conditions, in connection with trackage rights or lease transactions, that provide for compulsory arbitration of changes in working conditions; and found the imposition of such conditions imposed labor protection satisfied the requirements of 49 U.S.C. 11347); and *Matter of Chicago, M. ST. P. & Pac. R. Co.*, 658 F.2d 1149 (7th Cir. 1981) (Arising under the Milwaukee Railroad Restructuring Act, approved labor protective conditions requiring compulsory arbitration and permitting operations before an agreement is negotiated, in reliance on Commission precedent).

2) None of the cases relied upon by Cross-petitioners suggest a contrary result with the possible exception of *Texas & N.O.R.R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), which, if it is determined does so, we submit is wrongly decided: The Court's decision in *Short Line* v. *Transportation Union*, 396 U.S. 142 (1969) and of the United States Court of Appeals for the 10th Circuit in *St. Louis S.W. Ry. Co.* v. *Brotherhood of R.R. Signalmen*, 665 F.2d 987 (10th Cir. 1981) do not deal with Section 11341(a) at all, but rather deal with the status quo which is to be maintained pending mediation under the RLA. *City of Palistine* v. *United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 433 U.S. 950 (1973), on the other hand, addresses Section 11341(a) but has nothing to do with its relation to the RLA. Moreover, *City of Palistine* recognizes at least the qualified exemption from other laws conferred by Section 11341(a) and accept-

ed by the majority of the panel below; Cross-petitioners by their cross-petitions take exception to this.

This leaves only *Texas & N.O.R.R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962) (*Texas*). The broad language of this case arguably supports the position of cross-petitioners. However, the Commission believes that decision is properly confined to its peculiar facts and in any event is distinguishable from the case at hand. In *Texas*, the involved railroads had commenced the collective bargaining process under RLA prior to seeking approval of the involved transactions. Negotiations under RLA failed and the railroads then submitted to the Commission, proposed methods of operating not shown to be necessary to, or for that matter even desirable in, effecting the proposed transactions, which exactly mirrored the changes management had unsuccessfully sought to negotiate under RLA. The railroads contended that Commission approval of the transactions relieved them of any further obligation to negotiate the involved changes under RLA or, for that matter, any other provision of law. Under these circumstances, it is not surprising that the court in *Texas* and other courts that have referred to it have concluded that mere filing with the Commission of a proposed plan of operating does not permit management unilaterally to implement that plan.

The situation addressed in *Texas* differs markedly from the situation in the proceeding under review in a number of material respects. First, in this proceeding, the process for changing working conditions was not commenced by service of RLA's so-called Section 6 notices (45 U.S.C. § 156), but rather pursuant to the Commission's imposed *New York Dock* and *N&W/Mendocino* labor protective conditions. Second, as indicated in fn 1, *supra*, MP has never contended that it is not obligated to bargain with its employees over displacements resulting from the commencement of trackage right operations and, according to cross-petitioners, MKT has already bargained with its em-

ployees (See UTU Cross-Pet. p. 6–7; BLE Cross-Pet. p. 6). At issue is simply whether this bargaining takes place under the Commission's conditions which provide for compulsory arbitration in the event of an impasse, so as to assure that the approved transaction ultimately will be effected, or under the RLA procedures which do not provide for an assured resolution and are designed to stretch out the bargaining process. Finally, the issues removed from negotiation are not among parties to the transaction and their employees but, rather, as recognized by the district court in *Missouri,* reflect conditions imposed on applicants in connection with Commission approval of their merger over which they have no control and concerning which they have no right to vary the terms (580 F. Supp. at 1503; Addendum A to Petition in No. 85–792 at 23a–24a).

3) Other issues cross-petitioners seeks to raise either were not presented to or were not ruled on by the court below, and, hence, if their resolution were essential to resolution of the principal issue (which they are not), this Court would have to remand the issue to the court below or the Commission (which it need not).

a) Cross-petitioners seek (UTU Cross-Pet. p. 11–12; BLE Cross-Pet p. 11–13) a declaration that 11341(a) cannot supersede 11347—an issue which they concede the court below expressly declined to address (UTU Pet. p. 11). This issue would only be relevant if the Commission had failed to impose the minimum labor protection required by Section 11347. However, it is undisputed that the Commission imposed the so-called *New York Dock* conditions on its approval of the merger and the so-called *N&W/Mendocino* conditions upon its approval of trackage rights. Both of these sets of conditions have been approved as satisfying the minimum conditions required by Section 11347, despite arguments substantially similar to those inappropriately raised by cross petitioners here. See especially *RLEA, supra,* 675 F.2d at 1255.

b) To the extent cross-petitioners contend that either the Commission's conditions or section 11347 require negotiations between MP employees and MKT or DRGW in connection with the exercise of the trackage rights authority granted them, cross-petitioners cite absolutely no authority for the proposition. This is not surprising because there is none—a fact ignored by the majority below, except in connection with its holding that the petition is not time barred. See dissenting opinion in *BLE*, 761 F.2d at 729. However, the novelty of rail labor's argument does explain why the Commission took pains to explain to them its position on the subject.[3]

c) Finally, cross-petitioners argue (BLE Cross-Pet. p. 12–13; UTU Cross-Pet. p. 20) that article I, section 2 of both the *New York Dock* and *N&W* conditions prohibit changes in working conditions, except pursuant to RLA collective bargaining procedures. That argument, which was raised in passing before the Commission, was disposed of summarily by it (noting that the provision had to be read in the context of the Commission-approved transaction as a whole) and was not addressed at all by the court below. A

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[3] BLE contends (BLE Cross-Pet. p. 13 and 15) that the Commission's action in doing so is contrary to its own decision in *Leavens* v. *Burlington Northern*, 348 I.C.C. 962 (1977) (Leavens) and this Court's decision in *Norfolk & Western Ry. Co.* v. *Nemitz*, 404 U.S. 37 (1971). Contrary to BLE's suggestions, the Commission's actions in issue are consistent with both the *Leavens* and *Nemitz* cases. Here as in *Nemitz*, rail labor appeared to be questioning the overall coverage of the protective conditions imposed, at least as they related to the asserted right of MP employees to negotiate with MKT and DRGW over the manner in which they would institute approved trackage rights conditions. In *Leavens*, the Commission acknowledged the obligations imposed upon it by this Court's *Nemitz* decision to determine the overall sufficiency of agreements entered into between labor and management to meet statutorily required or Commission imposed labor protective conditions (348 I.C.C.; at 976–78), but held that this obligation did not extend to individual labor controversies such as the placement on the merged seniority roster of an individual employee. The Commission held that arbitration, pursuant to the provisions therefor in Commission imposed labor protective conditions, was the proper mechanism for the resolution of such disputes (*Id.* at 979).

substantially similar argument was categorically rejected by the D.C. Circuit in its *RLEA* decision, *supra* 675 F.2d at 1255–56, and is presently pending before that court in *RLEA* v. *ICC and USA*, 85–1636 (D.C. Cir. filed October 1, 1985). The latter will furnish a better vehicle for review of the issue, should review be necessary. That decision (attached as Addendum B to the Commission's Petition for Certiorari in No. 85–792) also explains in detail the Commission's view that the WJPA and Amtrak conditions have been subsumed into the labor protective conditions imposed by the Commission upon approval of proposed transactions.[4]

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in the previous petition of the Interstate Commerce Commission in Docket No. 85–792, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Cir-

[4] For present purposes it will suffice to note that the Commission's position is based upon its reading of this Court's decision in Nemitz coupled with the requirement of the 1976 amendment to what is now 49 U.S.C. § 11347 that the Commission impose upon consolidations labor protective conditions no less favorable than it has previously imposed (WJPA: See *Southern Ry-Control-Central of GA Ry.*, 311 I.C.C. 151 (1967)) and the so-called Amtrak conditions. The Commission did so and, as discussed *supra*, the resulting conditions have been found by the courts to satisfy the requirement of Section 11347.

cuit. The Court may wish to consolidate the Petitions filed in Docket Nos. 85-792, 85-793, 85-983 and 85-977.

Respectfully submitted,

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